

FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

EMMA JEAN YOUNGER,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL NO. 1991/44
)	
VIRGIN ISLANDS YACHT HARBOR,)	
INC., d/b/a RAMADA YACHT HAVEN)	
HOTEL & MARINA)	
)	
Defendant.)	
)	
_____)	

MEMORANDUM AND ORDER

This matter is before the Court on defendant Virgin Islands Yacht Harbor, Inc.'s motion for summary judgment in this negligence action. Upon consideration of defendant's motion, and a hearing held on December 2, 1993, judgment will be granted dismissing the case.

FACTS

In her complaint, Emma Jean Younger ("Younger"), the plaintiff in the above-captioned action, has alleged that she fell while using a bathtub at defendant's hotel on October 15, 1990. Plaintiff contends that her injuries were caused by defendant's negligence in:

- (a) failing to place safety strips and/or a mat in the tub;
- (b) failing to place warning signs around the affected area, or otherwise properly warning guests, including Plaintiff, of the slippery and potentially dangerous condition of the tub;
- (c) failing to provide adequate protection against said slippery conditions of the tub; and
- (d) [u]sing the type of unsafe tub in question in its hotel.

See Plaintiff's Complaint ¶ 14.

On January 8, 1993, defendant moved for summary judgment.¹ In support of its motion, defendant provided the affidavits of two of its employees. Leroy Knight, a maintenance worker at the hotel, states that on October 17, 1990, two days after the incident in question, he went to the room where plaintiff had been staying to place some non-skid strips in the bathtub, and, upon arrival, he noticed that strips were already adhered to the surface of the tub. According to his affidavit, Knight removed the existing strips and placed new ones on the surface of the tub. Jost Barens, the other affiant, states that the tub in plaintiff's room was of a standard design. Barens' affidavit

1. Defendant previously moved for summary judgment on January 31, 1992. That motion was denied on May 12, 1992. In doing so, Judge Fullam, sitting by designation, noted that "defendant has provided the Court with no evidence on the pertinent issues, and plaintiff can therefore not be criticized for not having done so either. The motion for summary judgment will be denied, without prejudice to a properly supported motion." Memorandum and Order at 2.

also includes a photograph taken on July 31, 1991, which Barens states is a fair representation of the bathing facility as it existed on the date of the accident.

Although this Court has granted plaintiff three extensions of time to respond to defendant's motion for summary judgment, plaintiff has not done so.² Plaintiff's counsel has indicated to this Court that he has been awaiting such time as he could depose defendant's affiants.³

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure instructs that this Court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P.

2. Defendant moved to deem its summary judgment motion conceded on May 17, 1993. See LRCi 7.1(j). Although almost one year has elapsed since defendant moved for summary judgment, and although plaintiff's failure to respond to the motion cannot be condoned, the Court will not deem defendant's motion conceded.

3. Counsel for plaintiff has inexplicably failed to provide an affidavit from his client which might have contradicted statements in the affidavits provided by defendant's witnesses. Nevertheless, at the hearing, this Court provided plaintiff with an opportunity to proffer what evidence, if any, plaintiff could present to counter the evidence submitted by defendant in support of its motion for summary judgment.

56(c); see also *Hersh v. Allen Products Co.*, 789 F.2d 230, 232 (3d Cir. 1986). In considering such a motion, this Court must resolve all doubts and inferences against the movant. See, e.g., *Myer v. Riegel Products Corp.*, 720 F.2d 303, 307 n.2 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984).

In this case, defendant has provided an affidavit to buttress its contention that, at the time of the accident, there were non-skid strips on the bottom of the bathtub. However, in response to defendant's interrogatories, plaintiff has stated that the bathtub was not equipped with a non-skid bottom, non-skid strips, nor a mat.⁴ Whether or not there is a genuine dispute as to this fact, the Court finds that this factual issue is not material for purposes of this case, which accordingly may be resolved by means of summary judgment.

DISCUSSION

This Court has not located, nor have the parties cited, any case law from this jurisdiction concerning the liability of

4. Defendant's seventh interrogatory asked plaintiff to "[d]escribe how any other person, entity or thing, including yourself contributed to causing the damages for which you are suing in this case." In response, plaintiff stated, under oath, that "[t]he tub did not have a non-skid bottom, non-skid strips, nor a mat." In its twenty-third interrogatory, defendant asked plaintiff to "describe in detail the type of tub which you claim was in the Defendant's hotel and why, in your opinion, you believe it was unsafe." Plaintiff responded that "[t]he bathtub . . . [had] no safety strips, or mat and no non-slip finish."

hotels to invitees, such as plaintiff, who sustain injury while using the hotel's bathtub. Accordingly, the Court must look to the Restatement of Torts and to case law from other jurisdictions in deciding the issues presented in this case.⁵

As a general matter, innkeepers must use reasonable care to keep their premises in a reasonably safe condition for their invitees. Although an innkeeper must warn invitees of dangers which the invitee could not be reasonably expected to anticipate and prevent injury to invitees when the innkeeper knows or reasonably should know of potential dangers on the premises, it is also well-established that an innkeeper is not an insurer of the personal safety of its guests. In other words, there is no duty to warn guests of conditions that are known and obvious.⁶

5. Virgin Islands law provides:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases in which they apply, in the absence of local laws to the contrary.

V.I. CODE ANN. tit. 1, § 4 (1967); see also *Walter Matter, S.A. v. The M/V Mar*, 27 V.I. 247, 262 & n.53 (D.V.I. 1992); *Baumann v. Canton*, 7 V.I. 60, 69 & n.5 (D.V.I. 1968).

6. The duties owed by defendant to plaintiff are set forth in section 343A of the Restatement (Second) of Torts. As a guest at defendant's hotel, plaintiff was a business invitee. See RESTATEMENT (SECOND) TORTS § 332 (1965). Section 343A(1) provides:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious
(continued...)

1. *Failure to Place Safety Strips or a Mat in the Tub*

Several courts have held in bathroom slip-and-fall cases that plaintiffs must be charged with the knowledge that bathtubs are slippery when wet. See, e.g., *Kutz v. Koury Corp.*, 377 S.E.2d 811, 813 (N.C. App. 1989) ("It is common knowledge that bathtub surfaces, especially when water and soap are added, are slippery and that care should be taken when one bathes or showers."); *Brault v. Dunfey Hotel Corp.*, No. 87-6899, 1988 U.S. Dist. LEXIS 14408, at *21-*22 (E.D. Pa. Sept. 14, 1988) (noting that "[t]he majority of courts charge guests with reasonable use of their senses to keep a lookout for open and obvious conditions in bathrooms" including the fact "that water is slippery on tub or shower surfaces"), *aff'd without opinion*, 870 F.2d 650 (3d Cir. 1989).

Because the potential danger created when a bathtub becomes wet is not hidden or difficult to detect, there is no duty, as a matter of law, to provide precautions against such conditions. Thus, even if a factfinder concluded that defendant failed to place safety strips or a mat in the bathtub in plaintiff's room, as plaintiff apparently contends, such a finding would be

(...continued)

to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Id. § 343A.

immaterial to the issues of breach of defendant's duty and negligence. See, e.g., *LaBart v. Hotel Vendome Corp.*, 213 F. Supp. 958 (D. Mass. 1963) (defendant not liable for injuries sustained by plaintiff who fell in tub that was not equipped with a bathmat); *Kutz*, 377 S.E.2d at 811 (upholding trial court's directed verdict for defendant where only one-half of the tub was equipped with non-skid strips); *Coyle v. Beryl's Motor Hotel*, 171 N.E.2d 355 (Ohio Ct. App. 1961) (finding that innkeeper was not negligent when guest fell in a tub that was not furnished with non-skid strips); *Brault*, 1988 U.S. Dist. LEXIS 14408 (refusing to hold that defendant was negligent where bathtub was not equipped with non-skid strips but stains on the tub may have given the appearance of strips).

2. *Failure to Place Warning Signs Around the Tub and Failure to Warn Plaintiff of the Potentially Dangerous Condition of the Tub*

Plaintiff's allegation that defendant was negligent because it failed to provide a written or verbal warning to her about the potentially dangerous condition of the tub must also fail as a matter of law. As the comments to the Restatement instruct:

The possessor of land may reasonably assume that . . . [an invitee] will protect [her]self by the exercise of ordinary care, or that [she] will voluntarily assume the risk of harm if [she] does not succeed in doing so. *Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to [her] that [she] may be expected to discover them.*

RESTATEMENT (SECOND) OF TORTS § 343A cmt. e (1965) (emphasis added).

3. *Failure to Provide Adequate Protection Against the Slippery Conditions in the Tub*

Counsel for plaintiff also contends that defendant had a duty to provide safety handrails or other similar devices to protect plaintiff against the slippery condition of the bathtub. However, because the weight of authority holds that it is common knowledge that bathtubs are slippery when wet, defendant had no more of a duty to supply handrails than it did to place a mat or non-skid strips in the bathtub.

4. *Use of a Bathtub of an Unsafe Type or Design*

In her complaint, plaintiff alleged that defendant was negligent because the bathtub was of an unsafe type. However, this allegation is contradicted by plaintiff's response to defendant's interrogatories,⁷ the Barens affidavit,⁸ and by the representation made on behalf of plaintiff by counsel during

7. See Response to Interrogatory Number 23 ("The bathtub appeared to be one of a regular size").

8. Paragraph four of the affidavit states that "[t]he bathtub . . . is a standard unit measuring thirty inches by sixty inches by fifteen inches."

argument at the hearing on this motion that plaintiff did not intend to assert that the design of the bathtub was defective.

5. *Negligent Placement of the Safety Strips*

At the hearing, plaintiff's counsel also suggested that, although defendant may not have had a duty to place safety strips or a mat in the bathtub, once it undertook to do so, it had a duty to install the strips or mat carefully. Unfortunately for plaintiff, there is no factual basis for concluding that defendant was negligent in the manner in which it placed the safety strips in the tub. Further, this argument directly contradicts the responses provided by plaintiff to defendant's interrogatories.⁹ Moreover, plaintiff has not provided any legal support for the contention that the hotel was required to adhere the strips in any particular configuration,¹⁰ and the only other court that apparently has considered such an argument has rejected it.¹¹

CONCLUSION

Accordingly, it is hereby

9. *See supra* note 4.

10. *Cf. Brault* (no negligence where stains on the tub looked like safety strips).

11. *See Kutz*, 377 S.E.2d at 813 (declining to conclude that "failure to maintain any certain number of non-slip strips was negligence on defendant's part").

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ORDERED that Defendant's Motion for Summary Judgment is
GRANTED; and it is further

ORDERED that this action is DISMISSED WITH PREJUDICE.

DATED this _29_ day of December, 1993.

ENTER:

_____/s/_____
THOMAS K. MOORE
CHIEF JUDGE

ATTEST:

ORINN F. ARNOLD, Clerk of the Court

By: _____
Deputy Clerk

cc: Desmond Maynard, Esq.
James Hymes, Esq.